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SOCIAL MOVEMENTS, LAW, AND SOCIETY:
THE INSTITUTIONALIZATION OF THE
ENVIRONMENTAL MOVEMENT

CARY COGLIANESE[†]

Social change lies at the heart of the definition of a social movement. A social movement is a broad set of sustained organizational efforts to change the structure of society or the distribution of society's resources.¹ Within social movements, law reformers typically view law as a resource or strategy to achieve desired social change.² Since social change is the purpose of a social movement, law reform generally is taken to provide a means of realizing that goal.³

According to this conventional view, social movements, law reform, and society interact in a simple, unidirectional fashion. Social movement organizations seek to secure law reform; in turn, changes in the law bring about changes in society. While this conventional conception dominates much research and can be helpful for the purpose of analyzing the direct effects of social movement law reform,⁴ it misses several important dimensions of the relationships among social

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¹ See, e.g., Mario Diani, *The Concept of Social Movement*, 40 SOC. REV. 1, 3-7 (1992) (surveying social scientists' conceptualizations of social movements as organizational efforts to achieve structural or distributional change in society); John D. McCarthy & Mayer N. Zald, *Resource Mobilization and Social Movements: A Partial Theory*, 82 AM. J. SOC. 1212, 1217-18 (1977) (defining a social movement as "a set of opinions and beliefs in a population which represents preferences for changing some elements of the social structure and/or reward distribution of a society").

² See JOEL F. HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE* 2, 36 (1978) (emphasizing the primacy of achieving substantive goals through law reform). In some cases, of course, law reformers may well seek legal change for other reasons, such as for its symbolic value or, less altruistically, as a means of organizational or professional maintenance.

³ *Id.*

⁴ See *id.* at 35 (examining the effectiveness of social movement law reform in part by assessing its impact on tangible movement goals); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 4-6 (1991) (analyzing whether litigation has resulted in significant social change).

movements, law, and society. First, social movements seek to effect social change through means other than law reform, whether it be by seeking to alter public opinion, mobilizing voters, or creating new, nonlegal norms of behavior. These shifts in public values and nonlegal norms can sometimes directly bring about social change. Second, changes in society's values and public opinion can feed back into the legal system and affect the prospects for law reform and enhance the effective implementation of legislation.⁵ Finally, law reform efforts themselves may have an impact on public opinion, with action by courts and other legal institutions sometimes lending legitimacy to the claims advanced by social movements.⁶ In these ways, social movements, law, and society interact with one another in a more dynamic, bidirectional fashion than is generally recognized.

The symbiotic nature of the relationships among social movements, law, and society is well illustrated by the history of the environmental movement. The environmental movement has contributed to dramatic changes in law and in public values in the United States, and, as a result, society has achieved notable improvements in some of its underlying environmental conditions. Yet the relationships among the environmental movement, law, and society have been decidedly interactive, not unidirectional, over the past three decades. The movement existed for much of the twentieth century as a small niche in American society, outside the mainstream of prevailing political discourse. Beginning around the early 1970s, however, the environmental movement began to transform both law and society. Congress created a large web of new federal environmental legislation along with new rights for citizens and environmental groups to file suits to enforce government regulation. Public opinion also shifted dramatically and the environment took a prominent, and seemingly

⁵ As Joel Handler has written, "[i]n general, it is exceedingly difficult to separate the independent effects of legal changes from effects caused by the interaction of legal changes with broader societal factors such as public opinion, the effects of timing, and social and economic conditions." HANDLER, *supra* note 2, at 37.

⁶ See Joseph Stewart, Jr. & James F. Sheffield, Jr., *Does Interest Group Litigation Matter? The Case of Black Political Mobilization in Mississippi*, 49 J. POL. 780 (1987) (demonstrating a statistical relationship between litigation and political mobilization); see also HANDLER, *supra* note 2, at 214-22 (describing how law reform litigation can result in publicity and popular political support); MICHAEL W. MCCANN, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION* 48 (1994) (showing how litigation has shaped expectations of female employees); STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* 7 (1974) ("Formal recognition by the courts may therefore improve the bargaining position of those upon whom the judges look with favor.").

permanent, place on the public agenda.⁷

Following its transformational period in the early 1970s, the movement settled back into a pattern of more normal politics and law reform. Compared with the dramatic shift in the legal landscape that accompanied the transformational period, the movement has more recently sought discrete, even incremental change, with activists working as often to maintain past gains as to achieve new ones. Environmental organizations have grown in both size and number since the 1970s, and they now work within a society that generally accepts the values of environmentalism, and within a regulatory regime that entrenches those values in law.

This Article examines the institutionalization of the environmental movement in the United States, paying particular attention to the movement's interaction with law and society. In Part I, I trace the rise of the environmental movement in American politics and the significant changes in both law and social attitudes that the movement helped bring about in the 1970s. In Part II, I show how the movement became more institutionalized beginning in the late 1970s and continuing through the 1990s. Just as the movement shifted from being a minority viewpoint in American politics to an institutionalized presence in the center of American political activity, its law reform efforts shifted as well. Reformers in the early 1970s pursued and achieved "transformational" law reform, helping to effectuate a dramatic change in the legal landscape through major legislation. In comparison, reformers in the institutionalized environmental movement now tend to pursue what more appropriately might be considered "normal" law reform, or efforts to secure discrete or incremental legal change as well as reactive efforts to maintain earlier legal gains.⁸

The fact that the contemporary environmental movement now plays a normal role in policymaking is indicative of the impact of the

⁷ See, e.g., MARY GRAHAM, *THE MORNING AFTER EARTH DAY: PRACTICAL ENVIRONMENTAL POLITICS* 55 (1999) (noting that "pollution control and conservation have won a permanent place on the American political agenda").

⁸ The distinction I make here between "transformational" law reform and "normal" law reform bears a certain affinity to Bruce Ackerman's distinction between the "higher lawmaking" of constitutional moments and the "normal lawmaking" characterized by ordinary political give-and-take. 1 BRUCE ACKERMAN, *WE THE PEOPLE* 6 (1991). Gerald Rosenberg makes a somewhat similar distinction when he differentiates between (1) litigation that aims to achieve "significant social reform" or "policy change with nationwide impact" and (2) litigation pursuing individual redress, changing the activities or procedures of an individual bureaucracy, or seeking to remove obstacles for other social reform efforts. ROSENBERG, *supra* note 4, at 4-5, 342.

movement on American law and society. Though the United States still confronts environmental challenges, the environmental movement has succeeded in achieving significant changes in law, social values, and certain environmental conditions. Yet the very success of the environmental movement has also tended to constrain the movement in important ways. In Part III of this Article, I suggest that environmentalism in the United States appears to have achieved a steady state, with law and social norms mutually reinforcing each other to maintain (at least for now) a relatively stable commitment to environmental protection. Environmental regulation has effectively addressed many tangible environmental problems and, in so doing, may have lessened the sense of urgency felt by the public when it comes to less palpable, but potentially no less serious, environmental concerns such as global warming. Even though public opinion has served to prevent a large-scale retreat from existing environmental controls, prevailing public sentiment tends to be latent and insufficient to support another transformational expansion of environmental regulation. The environmental movement finds itself fighting smaller battles to maintain past victories and faces competition and divisions within its ranks. Any major advances in environmental regulation will still require salient focal points and crises to prompt legislative action, but these very disasters are less likely to occur precisely because of the existing network of environmental regulation. The very presence of the set of environmental laws established during the transformational period of the 1970s makes it less likely that further significant transformations in environmental law will occur for many decades to come.

I. ENVIRONMENTALISM AS A SOCIAL MOVEMENT

The environmental movement in the United States dates back at least to the latter part of the nineteenth century, but the movement transformed itself dramatically during the latter half of the twentieth century. The changes that occurred during what many have called the "environmental decade" of the 1970s amounted to nothing less than a sea change in both public attitudes and environmental law. In this Part, I trace the development of the contemporary environmental movement in the United States and the legal and social changes that accompanied its growth.

A. *The Early Roots of the Environmental Movement*

Environmentalism's roots in American political life extend at least

as far back as the 1800s. In those early times, the movement manifested itself in two distinct, but sometimes related, strands. The first strand consisted of efforts principally by hunters, naturalists, and explorers to promote the conservation and preservation of the nation's forests and other natural resources. The second consisted of efforts by doctors, engineers, and urban reformers to develop sanitation systems, ensure clean water supplies, and improve the overall living conditions in America's growing cities.

The first manifestation of a concentrated environmental movement came in the late nineteenth and early twentieth centuries with efforts to improve the management of the nation's natural resources. Until this time, management of such resources was highly decentralized or, for some resources, entirely nonexistent. The rise of the Progressive Era saw the expansion of the federal government into management of water, land, and wildlife. Congress adopted legislation setting aside lands for reserves as well as authorizing the management of natural resources by a series of new agencies, including the Forest Service and the Bureau of Reclamation, and later, the Fish and Wildlife Service and the Bureau of Land Management.⁹ These agencies tended to favor the efficient management of natural resources, promoting the conservation philosophy articulated by Gifford Pinchot, the first director of the U.S. Forest Service. Pinchot held that resources should be managed to promote their efficient use for multiple purposes, including grazing, mining, logging, game protection, and recreation.¹⁰ By the first decade of the twentieth century, the federal government had set aside over one hundred million acres of national forests and created nearly a dozen major national parks.¹¹

Some of the earliest conservation groups came into existence during this period. John Muir founded the Sierra Club in 1892, and contemporaneous groups such as the Audubon Society, National Wildlife Federation, Ducks Unlimited, and the Izaak Walton League were organized by hunters and naturalists interested in the effective management of wildlife and forest resources. The Sierra Club, for example, took an active role in seeking to preserve pristine wild areas in

⁹ RICHARD N.L. ANDREWS, *MANAGING THE ENVIRONMENT, MANAGING OURSELVES: A HISTORY OF AMERICAN ENVIRONMENTAL POLICY* 137-48 (1999); ROBERT J. BRULLE, *AGENCY, DEMOCRACY AND NATURE: THE U.S. ENVIRONMENTAL MOVEMENT FROM A CRITICAL THEORY PERSPECTIVE* 150 (2000).

¹⁰ SAMUEL P. HAYS, *CONSERVATION AND THE GOSPEL OF EFFICIENCY: THE PROGRESSIVE CONSERVATION MOVEMENT, 1890-1920*, at 28-30 (1959).

¹¹ ANDREWS, *supra* note 9, at 146, 150; BRULLE, *supra* note 9, at 152-53.

and around the Yosemite Valley in California. Unlike other groups of the era, the Sierra Club tended to resist the prevailing multiple-use philosophy and favored instead the preservation of wild areas for their intrinsic value.¹²

A second early strand of the environmental movement could be found in America's growing cities around the beginning of the twentieth century. The growth of American cities in the latter part of the nineteenth century brought with it greater concentrations of people, new challenges in managing waste, and large-scale industrial facilities generating increased amounts of air and water pollution. A sanitation movement emerged, prompting the development of municipal landfills and water and sewage treatment systems.¹³ By the early decades of the twentieth century, the movement for improved living conditions in the nation's cities began to fuse with the progressive movement, which sought to clean up both city politics and the living and working conditions of urban residents.¹⁴ Civic reformers organized to promote the beautification of cities, establish parks, clean up streets, and reduce smog, soot, and other byproducts of industrialization.¹⁵

The urban reformers succeeded in making significant improvements in urban living conditions. For example, infant mortality rates in New York City reportedly dropped from about twenty-five percent in 1885 to less than ten percent in 1915, following the introduction of new drainage, sewage, and water systems.¹⁶ The very success of this new urban infrastructure took some of the momentum out of the urban sanitation movement, causing it to decline as a major force in urban politics. According to Richard Andrews, "[t]he sanitation movement fragmented in the early twentieth century, and while its several professional elements continued to develop and to make progress on some issues, no other broad-based movement to reduce urban and industrial pollution appeared until the modern environmental movement, more than half a century later."¹⁷

¹² For a history of the Sierra Club, see TOM TURNER, *SIERRA CLUB: 100 YEARS OF PROTECTING NATURE* (1991).

¹³ ANDREWS, *supra* note 9, at 113-20.

¹⁴ See *id.* at 109 (describing the relevance of the early urban public health movement to emerging environmentalism).

¹⁵ *Id.* at 129-30.

¹⁶ *Id.* at 133.

¹⁷ *Id.* at 109.

B. *The Rise of Contemporary Environmentalism*

In the 1960s, the American environmental movement reawakened. Controversies in the midcentury had erupted over public dams in the West and the dangers of nuclear conflict, but the movement's renaissance fully blossomed in the 1960s. In 1962, Rachel Carson published *Silent Spring*, dramatically warning of the long-term dangers of pesticide use.¹⁸ In succeeding years, Carson's book was joined by others that warned of environmental and social decay precipitated by unregulated industrial activity, including Stewart Udall's *The Quiet Crisis*,¹⁹ Ralph Nader's *Unsafe at Any Speed*,²⁰ Paul Ehrlich's *The Population Bomb*,²¹ and Barry Commoner's *Science and Survival*.²²

These popular books of the time not only warned of dangers from industrial activities, but also provided the public with a new conceptual apparatus for understanding ecological relationships and for constructing a broad-scale political movement.²³ Moreover, messages of ecological alarm and activism found a receptive audience during the sixties, when there was broader social unrest over civil rights and the Vietnam War. This sense of alarm was further fueled by several highly visible environmental disasters, including a major oil spill in Santa Barbara in 1969, and the infamous burning of the Cuyahoga River in Ohio.²⁴

The environmental movement that developed in the 1960s and early 1970s grew out of an extraordinary grassroots response to ecological disasters. Some of the tactics employed at the time fit into the anti-establishment mood of the period. Law reform tactics, similar in

¹⁸ See RACHEL CARSON, *SILENT SPRING* 68 (1962) (exclaiming that after herbicidal spraying on Forest Service lands, "[t]he living world was shattered"); see also THE ENVIRONMENTAL DEBATE: A DOCUMENTARY HISTORY 180 (Peninah Neimark & Peter Rhoades Mott eds., 1999) (describing the significance of *Silent Spring* to renewed environmentalism); KIRKPATRICK SALE, *THE GREEN REVOLUTION: THE AMERICAN ENVIRONMENTAL MOVEMENT, 1962-1992*, at 18 (1993) (explaining how *Silent Spring* added to the nervousness of the public because it "show[ed] the unanticipated evils of the 'wonder chemicals' of the fifties"); James P. Lester, *Introduction* to ENVIRONMENTAL POLITICS AND POLICY 1, 2-4 (James P. Lester ed., 1995) (noting that after the publication of *Silent Spring* and other books like it, "concern for the environment became so prominent that in 1972 a United Nations' conference . . . was held").

¹⁹ STEWART L. UDALL, *THE QUIET CRISIS* (1963).

²⁰ RALPH NADER, *UNSAFE AT ANY SPEED* (1965).

²¹ PAUL R. EHRLICH, *THE POPULATION BOMB* (1968).

²² BARRY COMMONER, *SCIENCE AND SURVIVAL* (1963).

²³ MARK DOWIE, *LOSING GROUND: AMERICAN ENVIRONMENTALISM AT THE CLOSE OF THE TWENTIETH CENTURY* 23 (1995); ANDREWS, *supra* note 9, at 202.

²⁴ ANDREWS, *supra* note 9, at 224.

some respects to those used by the civil rights movement,²⁵ figured prominently in the rise of the contemporary environmental movement.²⁶ Some early reformers even held out hope of winning a transformational declaration of a constitutional right to a clean environment.²⁷

Although environmental law reformers never succeeded in securing constitutional protection for environmental quality, their early litigation efforts did result in landmark victories that opened up governmental decision-making processes that had been previously closed to the claims of environmentalists.²⁸ For example, in 1965, environ-

²⁵ For discussion of the civil rights movement's use of litigation, see RICHARD KLUGER, *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality* (1977); MARK V. TUSHNET, *The NAACP's Legal Strategy Against Segregated Education, 1925-1950* (1987); CLEMENT VOSE, *Caucasians Only: The Supreme Court, the NAACP, and the Restrictive Covenant Cases* (1959); and Robert Jerome Glennon, *The Role of Law in the Civil Rights Movement: The Montgomery Bus Boycott, 1955-1957*, 9 LAW & HIST. REV. 59 (1991). For contrasting accounts of the impact and value of social movement litigation efforts, see ROSENBERG, *supra* note 4; and Michael W. McCann, *Reform Litigation on Trial*, 17 LAW & SOC. INQUIRY 715 (1993).

²⁶ See generally JOSEPH L. SAX, *Defending the Environment: A Strategy for Citizen Action* 125 (1971) (discussing the function of litigation in the environmental rights campaign); David Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 COLUM. L. REV. 612, 613 (1970) (discussing the role of judicial review in the environmental law field). Litigation, at least of the type envisioned by some of the environmental law reformers in the 1960s and early 1970s, is often viewed as an "outsider" political strategy. See, e.g., SAX, *supra*, at 108-09 (discussing the court's perspective as an objective outsider); Kim Lane Scheppele & Jack L. Walker, Jr., *The Litigation Strategies of Interest Groups*, in *MOBILIZING INTEREST GROUPS IN AMERICA: PATRONS, PROFESSIONS, AND SOCIAL MOVEMENTS* 157 (Jack L. Walker, Jr. et al. eds., 1991) (discussing litigation strategies as outsider tactics). Sometimes it is suggested that litigation is employed mainly by groups that are disadvantaged in the political process, that is, by groups seeking to advance claims towards which the so-called political branches of government are unreceptive. See LEE EPSTEIN, *Conservatives in Court* 67 (1985) (noting that the literature on interest group litigation has assumed "that interest groups resort to the courts only when they are politically disadvantaged"); Susan M. Olson, *Interest-Group Litigation in Federal District Court: Beyond the Political Disadvantage Theory*, 52 J. POL. 854, 855 (1990) (analyzing "the dubious predominance of the political disadvantage theory"). The reality is that litigation is employed both by insider and outsider groups, but that outsider groups are more likely to advance more novel or tenuous claims in court. See Richard C. Cortner, *Strategies and Tactics of Litigants in Constitutional Cases*, 17 J. PUB. L. 287 (1968) (arguing that the litigants responsible for a substantial amount of creative and innovative constitutional policy can be classified as "disadvantaged" and "aggressive"); Cary Coglianese, *Legal Change at the Margins: Revisiting the Political Disadvantage Theory* 4 (June 1998) (unpublished manuscript, on file with author) (discussing the political disadvantage theory as a useful explanation of ongoing legal change).

²⁷ ROSENBERG, *supra* note 4, at 271-72.

²⁸ Several significant cases of the time provided environmental organizations with

mentalists filed a lawsuit seeking to prevent the Consolidated Edison Company of New York from building a huge reservoir and storage facility above the Hudson River. In *Scenic Hudson Preservation Conference v. Federal Power Commission*, the plaintiffs contested the decision of the Power Commission to grant the necessary permits and licenses for the building of the reservoir.²⁹ The court reversed the Commission's decision and remanded the case for further consideration of the environmental impacts of the project.³⁰ Furthermore, the court ruled that the agency must grant those who have a special interest in the matter, including environmental organizations, the opportunity to be heard.³¹ This case, along with others, helped bring about a shift in agency practice that ensured that federal agencies would listen to the views of environmentalists before making significant policy decisions.

The 1960s and 1970s not only saw the growth and resurgence of older environmental organizations, such as the Sierra Club, but also the creation of new environmental organizations, particularly those that specialized in litigation. A successful lawsuit against the spraying of pesticides on Long Island brought together a group of scientists and lawyers who created the Environmental Defense Fund (EDF) in 1967.³² Other new environmental groups included the Natural Resources Defense Council, the Friends of the Earth, the Sierra Club Legal Defense Fund, Environmental Action, and Greenpeace.³³ Groups that had previously emphasized nature preservation, such as the Sierra Club, Wilderness Society, and the National Audubon Society, also worked together with the new environmental groups toward a

a greater role in policymaking. For a case holding that courts can compel agencies to comply with National Environmental Policy Act (NEPA) guidelines, see *Calvert Cliffs' Coordinating Committee v. United States Atomic Energy Commission*, 449 F.2d 1109, 1112 (D.C. Cir. 1971). For a case requiring the Secretary of Transportation to justify his plan to build through Overton Park, see *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 409 (1971). See *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972), for a case finding that environmental organizations could satisfy standing requirements by showing aesthetic or ecological injury. For a discussion of the role of litigation in environmental policy, see LETTIE M. WENNER, *THE ENVIRONMENTAL DECADE IN COURT* (1982).

²⁹ 354 F.2d 608, 611 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

³⁰ *Id.* at 624-25. For discussions of the *Scenic Hudson* litigation, see HANDLER, *supra* note 2, at 43-44; and THE ENVIRONMENTAL DEBATE, *supra* note 18, at 193-95.

³¹ *Scenic Hudson Pres. Conference*, 354 F.2d at 616.

³² BRULLE, *supra* note 9, at 185; SALE, *supra* note 18, at 21.

³³ BRULLE, *supra* note 9, at 185; Robert Cameron Mitchell et al., *Twenty Years of Environmental Mobilization: Trends Among National Environmental Organizations*, in AMERICAN ENVIRONMENTALISM 11, 12-14 (Riley E. Dunlap & Angela G. Mertig eds., 1992).

common cause of environmental protection.³⁴

Unlike many of the conservation organizations founded at the turn of the twentieth century, environmental organizations of the 1960s and 1970s secured a broad base of public support. The number of organizations demanding social change for the environment grew from several hundred to over three thousand by the end of the 1970s.³⁵ The number of citizens who joined environmental organizations also increased dramatically. The Sierra Club's membership grew nearly tenfold between 1952 and 1969.³⁶ Membership in the twelve largest environmental organizations grew from about one hundred thousand in 1960 to more than one million by 1972.³⁷

The grassroots nature of the contemporary environmental movement was best exemplified by the Earth Day celebration held on April 22, 1970. More than 1,500 colleges and 10,000 schools participated in this national event by holding parades, demonstrations, and protests.³⁸ At the University of Washington, for example, students displayed buckets of oil and invited onlookers to place their hands in the buckets to empathize with birds caught in an oil slick.³⁹ In Florida, students held a trial condemning the pollution caused by automobiles and symbolically buried a car.⁴⁰ In San Francisco, students dumped oil into the reflecting pool at the offices of the Standard Oil Company.⁴¹ At Kent State, students held a mock funeral for the "children of tomorrow" to symbolize the consequences of environmental destruction.⁴² Major street rallies were held in New York, Washington, D.C., and San Francisco. In total, at least twenty million people took part in what has been described as the "largest one-day outpouring of public support for any social cause in American history."⁴³

C. *Transformations in Law and Society*

The resurgence of the environmental movement resulted in sig-

³⁴ ANDREWS, *supra* note 9, at 225.

³⁵ SALE, *supra* note 18, at 32.

³⁶ JACQUELINE VAUGHN SWITZER & GARY BRYNER, ENVIRONMENTAL POLITICS: DOMESTIC AND GLOBAL DIMENSIONS 10 (1998).

³⁷ GRAHAM, *supra* note 7, at 37.

³⁸ ANDREWS, *supra* note 9, at 225.

³⁹ BRULLE, *supra* note 9, at 186.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ DOWIE, *supra* note 23, at 24.

nificant transformations in American society and law. Around the time of the 1970 Earth Day celebration, the environment secured a position at the top of the public's agenda. Over the course of two years—from 1968 to 1970—press coverage of the environment in the *New York Times* quadrupled, with that coverage remaining at the higher level for the next seven years.⁴⁴ Previous media coverage of environmental issues had been not only scant, but tended to focus on issues of wildlife and forests. Beginning in the 1970s, however, coverage shifted more toward issues of air and water pollution.⁴⁵ Words like “ecology” and “resource depletion,” which previously had no place in the ordinary American lexicon, came into common use.⁴⁶ According to a series of Gallup polls, the percentage of citizens viewing air and water pollution as problems that should receive the attention of government more than tripled between 1965 and 1970.⁴⁷ Gallup polls in 1965 indicated that seventeen percent of the public identified the environment as one of the three problems that government should address, while by 1970 that number had risen to fifty-three percent.⁴⁸ Over the succeeding decades, a substantial majority of Americans remained sympathetic to the cause of environmentalism.⁴⁹

Dramatic changes also took place in American law. On January 1, 1970, President Nixon declared that the next ten years would be “the environmental decade.”⁵⁰ On that same day, Nixon signed the National Environmental Policy Act (NEPA),⁵¹ which declared a national policy of “encourag[ing] productive and enjoyable harmony between man and his environment [and promoting] efforts which will prevent

⁴⁴ W. Douglas Costain & James P. Lester, *The Evolution of Environmentalism*, in ENVIRONMENTAL POLITICS AND POLICY, *supra* note 18, at 15, 33 fig.2.4.

⁴⁵ *Id.* at 31-32.

⁴⁶ SALE, *supra* note 18, at 23-24.

⁴⁷ Riley E. Dunlap, *Public Opinion and Environmental Policy*, in ENVIRONMENTAL POLITICS AND POLICY, *supra* note 18, at 63, 72.

⁴⁸ *Id.* at 72. Those viewing air pollution as “very or somewhat serious” in their vicinity more than doubled from twenty-eight percent in 1965 to sixty-nine percent in 1970, while the number expressing the same concern about water pollution in their area rose from thirty-five to seventy-four percent over that time span. *Id.* at 72 tbl.4.1. These levels of concern, however, have fluctuated over time. *Id.* at 82 tbl.4.3, 92 tbl.4.4.

⁴⁹ See *infra* notes 116-21 and accompanying text (discussing data indicating Americans' acceptance of the environmental movement).

⁵⁰ SWITZER & BRYNER, *supra* note 36, at 11.

⁵¹ Pub. L. No. 91-190, 83 Stat. 852 (codified as amended at 42 U.S.C. §§ 4321-4370d (1994)).

or eliminate damage to the environment,"⁵² and required each federal agency to consider the environmental impacts of its major activities.⁵³ In addition, Nixon created the Environmental Protection Agency (EPA) and consolidated within it federal responsibility for administering most of the nation's pollution control laws.⁵⁴ Over the course of a decade, the EPA grew from a budget of \$455 million and a staff of 6,000 in 1970 to a budget of \$5.6 billion and a staff of 13,000 in 1980.⁵⁵

Although federal air and water pollution legislation existed in the 1960s, these laws mainly empowered the federal government to conduct research and issue advisory standards.⁵⁶ The environment was still largely an issue addressed by state laws, which many observers viewed as fragmented and ineffective.⁵⁷ As public awareness and support for the environment grew, an expanded role for the federal government in environmental regulation became an issue in electoral politics. Senator Edmund Muskie, a Democrat from Maine and likely candidate in the 1972 presidential election, vocally supported new environmental legislation. President Nixon competed with Muskie to be viewed as a champion of the environment.⁵⁸ At the time, there seemed little to be lost and much to be gained by supporting the environment.⁵⁹

In 1970, Nixon signed the Clean Air Act, which called for new, protective federal air quality standards, required states to develop implementation plans to be overseen by the EPA, and imposed new controls on automobile emissions.⁶⁰ Two years later, Congress passed the

⁵² 42 U.S.C. § 4321 (1994).

⁵³ 42 U.S.C. § 4332(2) (1994); *see also* ANDREWS, *supra* note 9, at 229 (discussing forces behind Nixon's decision to sign the Act into law); HANDLER, *supra* note 2, at 45 (analyzing NEPA's policy statement).

⁵⁴ 42 U.S.C. § 4321.

⁵⁵ SALE, *supra* note 18, at 36.

⁵⁶ JAMES E. KRIER & EDMUND URSIN, POLLUTION AND POLICY: A CASE ESSAY ON CALIFORNIA AND FEDERAL EXPERIENCE WITH MOTOR VEHICLE AIR POLLUTION, 1940-1975, at 255 (1977) (noting less-than-aggressive federal pollution control policies between the 1940s and the 1960s).

⁵⁷ *See id.* (reviewing the early history of federal environmental legislation).

⁵⁸ *See id.* at 203 (detailing competition between Muskie and Nixon on environmental issues).

⁵⁹ *See* Dunlap, *supra* note 47, at 64 (discussing the significance of the public's support of environmental groups); *see also* Christopher H. Schroeder, *Rational Choice Versus Republican Moment: Explanations for Environmental Laws, 1969-73*, 9 DUKE ENVTL. L. & POL'Y F. 29, 50-59 (1998) (examining theories behind the popularity of the environmental movement among politicians).

⁶⁰ Clean Air Act of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended at 42 U.S.C. §§ 7401-7671q (1994)). *See generally* ENVIRONMENTAL POLICY: NEW

Clean Water Act, which declared a national goal of eliminating all discharge of pollutants into the navigable waters of the United States and imposed extensive new regulatory requirements on firms and municipalities.⁶¹ Between 1970 and 1977, Congress adopted fourteen major environmental statutes, marking an enormous expansion of federal authority over the environment.⁶² In contrast, in the ensuing years, a period more than three times as long, Congress has only adopted four new, major environmental statutes.⁶³ From the signing of NEPA in

DIRECTIONS FOR THE TWENTY-FIRST CENTURY 389 app. (Norman J. Vig & Michael E. Kraft eds., 4th ed. 2000) (placing the Clean Air Act Amendments within the context of Nixon administration environmental legislation); GRAHAM, *supra* note 7, at 48 (summarizing the impact of the Clean Air Act); PAUL R. PORTNEY & ROBERT N. STAVINS; PUBLIC POLICIES FOR ENVIRONMENTAL PROTECTION 77-115 (2d ed. 2000) (detailing the history of air pollution legislation, before and after the Clean Air Act Amendments).

⁶¹ Federal Water Pollution Control Act Amendments of 1972 ("Clean Water Act"), Pub. L. No. 92-500, 86 Stat. 896 (codified as amended at 33 U.S.C. §§ 1251-1387 (1994)).

⁶² The major legislation adopted in the early to middle 1970s included: National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (codified as amended at §§ 4321-4370d (1994)); Clean Air Act of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended at 42 U.S.C. §§ 7401-7671q (1994)); Federal Water Pollution Control Act Amendments of 1972 ("Clean Water Act"), Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251-1387 (1994)); Coastal Zone Management Act of 1972, Pub. L. No. 92-583, 86 Stat. 1280 (codified as amended at 16 U.S.C. §§ 1451-1464 (1994)); Federal Environmental Pesticide Control Act of 1972, Pub. L. No. 92-516, 86 Stat. 975 (codified as amended at 7 U.S.C. §§ 136a-136y (1994)); Marine Protection, Research, and Sanctuaries Act of 1972, Pub. L. No. 92-532, 86 Stat. 1052 (codified as amended at 33 U.S.C. §§ 1401-1445 (1994)); Noise Control Act of 1972, Pub. L. No. 92-574, 86 Stat. 1234 (codified as amended at 42 U.S.C. §§ 4901-4918 (1994)); Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531-1544 (1994)); Safe Drinking Water Act of 1974 Pub. L. No. 93-523, 88 Stat. 1660 (codified as amended at 42 U.S.C. § 300f (1994)); Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2744 (codified as amended at 43 U.S.C. §§ 1701-1784 (1994)); National Forest Management Act of 1976, Pub. L. No. 94-588, 90 Stat. 2949 (codified as amended at 16 U.S.C. §§ 1601-1614 (1994)); Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2796 (codified as amended at 42 U.S.C. §§ 6901-6992k (1994)); Toxic Substances Control Act of 1976, Pub. L. No. 94-469, 90 Stat. 2003 (codified as amended at 15 U.S.C. §§ 2601-2692 (1994)); and Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, 91 Stat. 447 (codified as amended at 30 U.S.C. §§ 1201-1328 (1994)).

⁶³ The major new acts of legislation since 1977 consisted of: Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA or "Superfund"), Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601-9675 (1994)); Emergency Planning and Community Right-To-Know Act of 1986, Pub. L. No. 99-499, 100 Stat. 1729 (codified at 42 U.S.C. §§ 11001-11050 (1994)); Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 486 (codified as amended at 33 U.S.C. §§ 2701-2760 (1994)); and Pollution Prevention Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388-21 (codified at 42 U.S.C. §§ 13101-13109 (1994)). Congress has adopted other, less significant legislation over the years, as well as amendments to many of the

1970 to the adoption of the Superfund law in 1980, the 1970s saw the enactment of what became, and still remains, virtually the entire environmental regulatory system in the United States.

Taken together, this new legislation signified a transformation in American law that could be described as quasi-constitutional in scope. The legislation imposed tough new federal standards, putting the national government in the driver's seat. It required the environment to be factored into governmental decision making about all major federal activities.⁶⁴ It empowered, and even commanded, the EPA to craft new rules, a power that it has used to create hundreds of new environmental regulations each year.⁶⁵ Finally, it authorized the filing of citizen suits, enabling environmental groups to take polluting firms directly to court on their own initiative to enforce federal and state environmental requirements.⁶⁶

These legal transformations have had a significant effect on environmental conditions and economic activity in the United States. The levels of certain air pollutants targeted by the Clean Air Act have declined substantially. For example, between 1980 and 1999, a period that saw significant growth in population, economic activity, and vehicle miles, levels of lead in the air fell ninety-four percent, carbon monoxide dropped fifty-seven percent, and sulfur dioxide declined by fifty percent.⁶⁷ Reported releases of toxic chemicals by industry declined by about forty-five percent between 1988 and 1998.⁶⁸ Water

major laws adopted in the 1970s, some of them quite substantial amendments. Even if this other legislation is taken into consideration, environmental lawmaking in the 1970s still markedly outpaced environmental lawmaking in the 1980s and 1990s.

⁶⁴ See 42 U.S.C. § 4332(2)(C) (requiring federal agencies to include an environmental impact statement in every recommendation, report, or proposal for legislation and "other major federal actions significantly affecting the quality of the human environment").

⁶⁵ For a discussion of the deadlines for rulemaking contained in environmental statutes, see ENVTL. AND ENERGY STUDY INST. & ENVTL. LAW INST., *STATUTORY DEADLINES IN ENVIRONMENTAL LEGISLATION* (1985).

⁶⁶ See MICHAEL D. AXLINE, *ENVIRONMENTAL CITIZEN SUITS* §§ 1.01-.03 (1991) (outlining the origins of citizen suits in environmental law); ENVTL. LAW INST., *CITIZEN SUITS* (1984) (reporting on citizen suits filed between 1978 and 1984 under several EPA administered statutes); Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 BUFFALO L. REV. 833 (1985) (dissecting citizen environmental suits and analyzing their effect).

⁶⁷ U.S. ENVTL. PROT. AGENCY, *NATIONAL AIR QUALITY AND EMISSIONS TRENDS REPORT*, 1999, at 11, 17, 63 (2001), available at <http://www.epa.gov/oar/aqtrnd99>.

⁶⁸ U.S. ENVTL. PROT. AGENCY, *1998 TOXICS RELEASE INVENTORY: PUBLIC DATA RELEASE 4-17* (2000), available at http://www.epa.gov/tri/tri98/pdr/1998_PDR.pdf.

quality has improved in a number of areas around the country, and industries today manage their wastes much more carefully than they did several decades ago. Some will conclude, of course, that these changes have been far from adequate given the magnitude of environmental problems still remaining. Others will argue that these changes have come at too great a cost. However one evaluates the impact of environmental regulation, it is clear that the current legal structure dealing with the environment represents an enormous transformation from that which existed prior to the 1970s.

II. THE INSTITUTIONALIZATION OF ENVIRONMENTALISM

During the 1960s and early 1970s, the environmental movement not only helped to bring about a remarkable transformation in American law and public opinion, it also transformed itself from a movement serving a relatively small constituency into a major force in American society. By the middle of the 1970s, the movement had become a fully institutionalized presence in the political process.⁶⁹ The movement did not continue the protest tactics exemplified by Earth Day but instead employed traditional insider political strategies. Litigation shifted away from the earlier attempts to transform governmental procedures and secure landmark victories, toward more routine, even defensive use of the courts. In the 1980s and 1990s, national environmental organizations succeeded in activating public opinion to resist counter-efforts aimed at undoing the legislative gains of the 1970s, but they have faced much greater difficulty in attempting to alter public opinion enough to move the environmentalist agenda forward. In this Part, I examine the trend of the environmental movement toward greater institutionalization and the challenges and opportunities the movement has encountered as it has matured.

A. *Bringing the Movement Inside*

The creation of an extensive set of new environmental laws com-

⁶⁹ See ANDREWS, *supra* note 9, at 239 (discussing the EPA's effort to find its proper place in the political landscape of the 1970s). Some have even suggested that environmentalism has become so embedded in the fabric of society that it no longer properly can be described as a social "movement." See, e.g., Christopher J. Bosso, *After the Movement: Environmental Activism in the 1990s*, in ENVIRONMENTAL POLICY IN THE 1990S: TOWARD A NEW AGENDA 31, 48 (Norman J. Vig & Michael E. Kraft eds., 2d ed. 1994) (suggesting that environmentalism is "los[ing] its image as a separate movement and becom[ing] truly part of the American value system").

pelled the leaders of environmental organizations to strengthen their presence in Washington, D.C., to oversee the implementation of the new legislation.⁷⁰ Perhaps the clearest indication of the ascendancy of environmentalism came in the mid- to late 1970s when a number of leaders from environmental organizations assumed positions in the Carter administration. President Carter appointed environmentalists to positions in the EPA, the Department of the Interior, and the Department of Justice. As one environmental lawyer remarked at the time: "Before, we filed lawsuits and held press conferences. Now we have lunch with the assistant secretary to discuss a program."⁷¹

As environmental organizations broadened their connections within government, they deepened their reliance on the kinds of political and legal strategies employed by other established interest groups in Washington, D.C.⁷² Legislative and administrative lobbying, along with strategic use of the media and electoral efforts, became mainstays within the environmentalist toolkit.⁷³ Grassroots mobilization, when employed, became integrated into the environmentalists' legislative agenda and was strategically targeted at specific members of Congress.

Environmental groups' use of litigation became relatively more routine and incremental as the movement matured.⁷⁴ Instead of seeking a broad transformation of American law, environmentalists turned to the courts to enforce and maintain the legislative victories they had

⁷⁰ See DOWIE, *supra* note 23, at 64 (discussing the decision of national mainstream environmental groups to remain in Washington after having seen the successful passage of progressive environmental legislation); Costain & Lester, *supra* note 44, at 27 (noting that the institutionalization of environmental values in law and government agencies helped to embed environmental groups within "issue networks" and "policy communities").

⁷¹ Helen M. Ingram et al., *Interest Groups and Environmental Policy*, in ENVIRONMENTAL POLITICS AND POLICY, *supra* note 18, at 115, 129.

⁷² See Christopher J. Bosso, *Seizing Back the Day: The Challenge to Environmental Activism in the 1990s*, in ENVIRONMENTAL POLICY IN THE 1990S: REFORM OR REACTION? 53, 67 (Norman J. Vig & Michael E. Kraft eds., 3d ed. 1997) (observing that "the national [environmental] groups are guilty of being normal Washington lobbies").

⁷³ Mark Dowie reports that in 1969 there were only two registered environmental lobbyists in Washington, D.C., but that by 1985 there were nearly ninety. DOWIE, *supra* note 23, at 59.

⁷⁴ Moreover, environmental law has spread and become embedded in the normal practice of law. See James L. Huffman, *The Past and Future of Environmental Law*, 30 ENVTL. L. 23, 23 (2000) ("[E]nvironmental law has gone from a legal curiosity to a mainstay of modern legal practice and public policy. What was once the exclusive cause of radicals is now the day-to-day work of legions of button-down lawyers from Wall Street to San Francisco.").

previously secured.⁷⁵ They made use of the citizen suit provisions of the major environmental statutes to secure penalties against corporations. They initiated legal actions to prompt the EPA to promulgate regulations required by statute. When the EPA issued such regulations, they filed court challenges to prompt the EPA to make its rules more stringent. They also joined in litigation filed by business groups, seeking to prevent the courts and the EPA from deciding to relax the agency's regulatory decisions. Instead of pursuing litigation to achieve transformational results, environmentalists essentially employed court-based tactics just as any normal interest group would. Like other groups, they continued to work closely with agency staff through insider channels at the same time as they pursued legal action in court.⁷⁶

Environmental organizations grew more professional, increasing both the size and the specialization of their staffs. In order to be effective participants in the realm of insider politics, environmental groups needed their own teams of scientists and economists, as well as lawyers. They also employed professional fundraisers, media consultants, and membership recruitment specialists. As Ronald Shaiko writes, "[f]rom their executive directors to low level staffers, environmental organizations shed their amateur structure and image for a more professional look."⁷⁷ Some groups, such as the Sierra Club and National Wildlife Federation, even developed extensive publishing operations to promote environmental awareness as well as to help raise necessary funds. By 1981, the National Wildlife Federation operated with an annual budget of \$32 million, the Sierra Club with \$12 million, and the Environmental Defense Fund with nearly \$3 million.⁷⁸ On average, environmental groups employed over nine times as many full-time staff members in 1990 than they did in the early 1960s.⁷⁹

⁷⁵ See Lettie McSpadden, *Environmental Policy in the Courts*, in ENVIRONMENTAL POLICY IN THE 1990S, *supra* note 72, at 168, 171 (stating that "environmental groups that urged Congress to pass legislation also come before the courts to have the law enforced"). For a general discussion of trends in environmental litigation, see ROSEMARY O'LEARY, ENVIRONMENTAL CHANGE: FEDERAL COURTS AND THE EPA (1993); WENNER, *supra* note 28; and Robert Glicksman & Christopher H. Schroeder, *EPA and the Courts: Twenty Years of Law and Politics*, LAW & CONTEMP. PROBS., Autumn 1991, at 249.

⁷⁶ See Cary Coglianese, *Litigating Within Relationships: Disputes and Disturbance in the Regulatory Process*, 30 LAW & SOC'Y REV. 735, 743 (1996) ("[M]ost litigation actually gets employed by the same types of groups that are most active in agency rulemaking.").

⁷⁷ RONALD G. SHAIKO, VOICES AND ECHOES FOR THE ENVIRONMENT: PUBLIC INTEREST REPRESENTATION IN THE 1990S AND BEYOND 27 (1999).

⁷⁸ *Id.* at 43.

⁷⁹ FRANK R. BAUMGARTNER & BRYAN D. JONES, AGENDAS AND INSTABILITY IN

The major environmental organizations, although fewer in number than corporations and trade associations, deployed resources and tactics on a par with business organizations.⁸⁰ Environmentalism had grown to be one of the largest social movements in American history.⁸¹ Instead of existing as a minority voice in the political process, the environmental movement became a part of the American political and social fabric. Environmentalism had matured from a social movement to an extensive network of interest group organizations with a presence in Washington, D.C., like that of any other political lobby.⁸²

B. *Reaction and Maintenance*

In 1981, the Reagan administration took office with an agenda aimed at reducing the burdens of federal regulation. Several Reagan appointees, most notably James Watt as Secretary of the Interior and Anne Gorsuch Burford as EPA Administrator, stirred up much controversy among environmentalists and the public. Watt, who was not known for being soft-spoken, openly criticized environmentalists and made decisions to open up federal lands to mining, logging, and oil and gas exploration.⁸³ Environmentalists alleged that the Reagan administration sought to sabotage the EPA through budget cuts and reorganization, and that Burford gave assurances to corporate polluters that they could violate environmental laws with impunity.⁸⁴

AMERICAN POLITICS 187 (1993).

⁸⁰ See DOWIE, *supra* note 23, at 61 (arguing that, today, environmentalists in Washington are "barely distinguishable from any other Washington lobbyist"); Christopher J. Bosso, *Adaptation and Change in the Environmental Movement*, in INTEREST GROUP POLITICS 151, 153 (Allan J. Cigler & Burdett A. Loomis eds., 3d ed. 1991) (observing that "[t]he major environmental organizations now command resources and use a range of tactics similar to anything deployed by the traditional economic interests on which most theories of interest group politics are based"). But see BRULLE, *supra* note 9, at 113 (noting that "industrial interest groups have a consistent advantage over environmental groups, both in [the] number of organizations and in [the] number of persons employed by these organizations").

⁸¹ BRULLE, *supra* note 9, at 113-14.

⁸² According to Chris Bosso, this move to the inside is an inevitable step in the progression of any successful social movement, whose "activists become part of the establishment, no longer outsiders but 'respectable' representatives of legitimate views. The alternative is to remain permanent outsiders, but American history suggests that no movement has succeeded by remaining entirely out of the mainstream." Christopher J. Bosso, *The Color of Money: Environmental Groups and the Pathologies of Fund Raising*, in INTEREST GROUP POLITICS 101, 125 (Allan J. Cigler & Burdett A. Loomis eds., 4th ed. 1995).

⁸³ JONATHAN LASH ET AL., A SEASON OF SPOILS 231-35 (1984).

⁸⁴ See *id.* at 68-70 (discussing the public's reactions to Burford's policies).

In response to the Reagan administration's countermovement, the "Group of Ten" environmental groups joined together to coordinate a response.⁸⁵ These major national organizations mobilized to oppose the actions of Secretary Watt and seek his removal from office, garnering over one million signatures on a petition urging Reagan to remove Watt from office. In 1983, after he made some further controversial remarks, Watt was forced by the White House to tender his resignation. Under a cloud of scandal at the EPA,⁸⁶ Burford also resigned in 1983 and was replaced by the EPA's original administrator, William Ruckelshaus, who had an impeccable reputation for integrity.⁸⁷ Numerous other senior officials at the EPA were also forced to leave as a result of the controversy.

In the subsequent years of the Reagan administration, Congress renewed every major environmental statute up for reauthorization, including the Resource Conservation and Recovery Act, Superfund, the Safe Drinking Water Act, and the Clean Water Act.⁸⁸ The Superfund Amendments, for example, tightened clean-up requirements and led to a nationwide right-to-know program, which required industry to report publicly the use and release of toxic chemicals. The Asbestos Hazardous Emergency Response Act of 1986 required every school to implement plans for asbestos inspection, management, and parent notification.⁸⁹ The Clean Water Act of 1987 required states to adopt policies to address toxic water pollutants.⁹⁰

The environmentalists' successful response to the Reagan administration's countermovement campaign served to reveal the depth of public support for environmental values. Even in a period of otherwise popular support for President Reagan, the environmental movement not only managed to sustain itself and resist counter-efforts, but

⁸⁵ The "Group of Ten" organizations included the Defenders of Wildlife, Environmental Defense Fund, Environmental Policy Institute, Izaak Walton League, National Audubon Society, National Parks and Conservation Association, National Wildlife Federation, Natural Resources Defense Council, Sierra Club, and the Wilderness Society.

⁸⁶ Burford found herself subject to a contempt of Congress citation for failing to turn over documents to congressional investigators. See PHILIP SHABECOFF, *A FIERCE GREEN FIRE: THE AMERICAN ENVIRONMENTAL MOVEMENT* 212 (1993) (discussing the investigations by Congress). An EPA employee, Rita Lavelle, was convicted of criminal charges of perjury and obstruction of justice. *Id.*

⁸⁷ *Id.* at 212-13.

⁸⁸ Michael E. Kraft, *Environmental Policy in Congress: From Consensus to Gridlock*, in ENVIRONMENTAL POLICY, *supra* note 60, at 121, 127-28.

⁸⁹ ANDREWS, *supra* note 9, at 262.

⁹⁰ *Id.*

it actually thrived. The Reagan administration proved to be excellent for environmental organizations' membership recruitment. Between 1979 and 1983, the Sierra Club grew to 346,000 members, the Wilderness Society doubled its membership, and the Audubon Society added 200,000 members.⁹¹ By the end of the Reagan presidency, the environmental movement was probably stronger than ever. It had secured a national presence and had placed environmental issues within the American consciousness. In 1988, over ninety percent of Americans were comfortable calling themselves environmentalists.⁹²

By 1990, an estimated 12,000 local and regional environmental groups had been established, in addition to at least 325 organizations of national standing.⁹³ In 1991, about twenty million people, or as many as one in seven adults, belonged to national environmental organizations.⁹⁴ The combined annual budgets for the major environmental organizations had grown as high as \$600 million.⁹⁵

Although environmental groups sustained themselves, public opinion polls in the early 1990s appeared to indicate a weakening in public support for the environmental movement.⁹⁶ Two years into the Clinton administration, Republicans captured both houses of Congress, running on a "Contract with America" that called for a reduction in federal regulation. After Congress proposed revisions in various environmental laws, environmentalists mobilized a strong public backlash. President Clinton and his advisors, chiefly pollster Dick Morris, came to see the environment as a key issue on which they could challenge the Republicans. Clinton adopted a hard-line position, twice allowing the government to shut down because he would not sign appropriations bills containing riders which environmentalists viewed as threatening public health.

Clinton's actions were widely favored by the public and the Re-

⁹¹ HAL K. ROTHMAN, *SAVING THE PLANET: THE AMERICAN RESPONSE TO THE ENVIRONMENT IN THE TWENTIETH CENTURY* 170 (2000).

⁹² DOWIE, *supra* note 23, at 73.

⁹³ SALE, *supra* note 18, at 77.

⁹⁴ *Id.* at 79-80.

⁹⁵ *Id.* at 81.

⁹⁶ From 1991 to 1994, responses to polling questions regarding the government's involvement in the environment shifted dramatically. While a majority of Americans during the 1980s thought that the federal government had too little involvement in environmental protection, and only a small minority thought that the federal government played too large a role, the percentages converged in the early 1990s. By 1994, only forty percent thought the federal government was doing too little while thirty-one percent thought it was doing too much. SHAIKO, *supra* note 77, at 31, 33.

publicans learned that they had miscalculated. In interpreting polling responses showing comparatively weak support for the environmental movement, Republican analysts fell into the trap of thinking these equated with opposition to environmental regulation. It became clear that even though the environment may not have been foremost in their minds during the early 1990s, Americans were still very much concerned about the environment. Although the salience of the environment may have waned, "overall public concern endures 'to the point that support for environmental protection can be regarded as a "consensual" issue which generates little open opposition.'"⁹⁷

C. *Divisions and Diffusion*

Mainstream environmental organizations came together in the 1980s and again in the 1990s to resist countermovement efforts, but the environmental movement as a whole also experienced significant internal divisions during this same period. Indeed, as the movement has grown more institutionalized, divisions within it have become evident. Michael McCloskey, a former executive director and chairman of the Sierra Club, has observed that for most of the 1970s, "the environmental movement was remarkably free of stress over ideology. However, this changed . . . by the mid-1980s when a new radical wing emerged in the environmental movement."⁹⁸ As they matured, the major movement organizations came to be perceived by some as insular, bureaucratized, and out of touch. Segments of the environmental community did not find their values well represented by the mainstream groups.⁹⁹

Several new strands of environmentalism began to appear. The first of these, "deep ecology," grew into favor among those who value nature independent of human existence and seek equal treatment for all forms of life. Deep ecology organizations developed in part out of a rejection of the growing institutionalization of the environmental

⁹⁷ Christopher J. Bosso, *Environmental Groups and the New Political Landscape*, in ENVIRONMENTAL POLICY, *supra* note 60, at 55, 57 (quoting Riley E. Dunlap, *Public Opinion and the Environment (U.S.)*, in CONSERVATION AND ENVIRONMENTALISM: AN ENCYCLOPEDIA 535, 536 (Robert Paehlke ed., 1995)).

⁹⁸ Michael McCloskey, *Twenty Years of Change in the Environmental Movement: An Insider's View*, in AMERICAN ENVIRONMENTALISM, *supra* note 33, at 77, 78.

⁹⁹ The founders of some of the most recent environmental groups, such as Lois Gibbs, founder of the Citizens Clearing House on Hazardous Waste, and Dave Foreman, a cofounder of Earth First!, have expressed extreme frustration and disappointment with the mainstream environmental organizations.

movement.¹⁰⁰ For example, Dave Foreman, the cofounder of a more radical environmental group called Earth First!, “deplored the new generation of incoming leader-managers—the institutionalizers” who “donn[ed] business suits, purchas[ed] lavish office buildings, and scribbl[ed] out organizational business plans.”¹⁰¹ Deep ecology organizations such as Earth First! and the Sea Shepherd Conservation Society started to use protest and civil disobedience tactics to pursue their more radical environmental goals.¹⁰²

A second strand of environmentalism formed around issues of environmental justice, that is, the concern that environmental problems disproportionately burden poor people and people of color.¹⁰³ Many environmental justice organizations grew up in poor and minority communities. Aided by law reformers, these community groups have pursued protest and litigation, with varying degrees of success, in an effort to remedy perceived racial disparities in the distribution of environmental risks.¹⁰⁴

A third strand of progressive environmentalism linked environmental concerns to religious values. This strand, often called “eco-

¹⁰⁰ BRULLE, *supra* note 9, at 197-98; DONALD SNOW, *INSIDE THE ENVIRONMENTAL MOVEMENT: MEETING THE LEADERSHIP CHALLENGE* 138 (1992).

¹⁰¹ SNOW, *supra* note 100, at 138.

¹⁰² See PHILLIP F. CRAMER, *DEEP ENVIRONMENTAL POLITICS: THE ROLE OF RADICAL ENVIRONMENTALISM IN CRAFTING AMERICAN ENVIRONMENTAL POLICY* 15 (1998) (listing the activities of EarthFirst! and Sea Shepherd Conservation Society, including tree sitting, taking over federal buildings, and sinking whaling boats).

¹⁰³ CHRISTOPHER H. FOREMAN JR., *THE PROMISE AND PERIL OF ENVIRONMENTAL JUSTICE* 1-2 (1998). In addition to race and socioeconomic class, gender issues have also been raised as part of contemporary environmentalism. In 1982, the first eco-feminist organization was founded, World Women in Defense of the Environment, with the goal of promoting “the inclusion of women and their environmental perceptions in the design and implementation of development and environmental policies.” BRULLE, *supra* note 9, at 227.

¹⁰⁴ Community organizations have been unsuccessful in raising equal protection claims. See Coglianese, *supra* note 26, at 16-18 (finding that none of the suits challenging the siting of hazardous waste facilities on equal protection grounds have been successful largely due to the difficulty of showing the requisite discriminatory intent). There has been slightly more success, though still quite mixed, for litigation filed under Title VI of the Civil Rights Act. See *S. Camden Citizens in Action v. N.J. Dep’t of Env’tl. Prot.*, 145 F. Supp. 2d 446 (D.N.J.), *modified*, 145 F. Supp. 2d 505 (D.N.J. 2001) (granting plaintiffs’ motion for a preliminary injunction based on a claim of disparate impact discrimination where the industrial facility was situated in an impoverished New Jersey neighborhood in which ninety-one percent of the residents were persons of color). See generally Julia B. Latham Worsham, *Disparate Impact Lawsuits Under Title VI, Section 602: Can a Legal Tool Build Environmental Justice?*, 27 B.C. ENVTL. AFF. L. REV. 631 (2000) (exploring the possibility of Title VI as a basis for environmental justice claims).

theology," holds that nature possesses a spiritual value and that humankind is therefore obligated to protect and preserve the environment. In the 1990s, two dozen major religious groups developed a unified mission statement on the environment, and the National Council of Churches developed a working group on the environment.¹⁰⁵

At the same time that new progressive organizations emerged within the environmental movement, some existing groups, such as the Environmental Defense Fund (EDF),¹⁰⁶ began to pursue still more pragmatic strategies, such as favoring the use of market-based incentives as alternatives to conventional regulation. Market-based approaches, such as emissions trading, promise to lower the costs of achieving environmental goals.¹⁰⁷ EDF's president, Fred Krupp, argued in favor of these approaches because he claimed Americans do not want to choose "between improving our economic well-being and preserving our health and natural resources."¹⁰⁸ EDF has attempted to work cooperatively with those who otherwise might appear to environmentalists as adversaries. An example is a project through which EDF helped the McDonald's Corporation reduce certain kinds of fast-food packaging and waste.¹⁰⁹ EDF also supported the sulfur dioxide emissions trading program which Congress adopted as part of the 1990 Clean Air Act Amendments.¹¹⁰

In addition to divisions within the movement, the values of environmentalism began to diffuse throughout society and were captured by other kinds of political organizations, such as unions. Business even began to espouse green values. By the mid-1980s, the environmental movement confronted greater competition both from within its own ranks as well as from external groups.

April 22, 1990, marked the twentieth anniversary of Earth Day. This time the celebration had a \$3 million budget and involved millions of people from around the world in its activities.¹¹¹ The event,

¹⁰⁵ BRULLE, *supra* note 9, at 234; McCloskey, *supra* note 98, at 85.

¹⁰⁶ The Environmental Defense Fund (EDF) recently changed its name simply to Environmental Defense, but I use the organization's former name and acronym in this Article.

¹⁰⁷ For a comprehensive discussion of market-based environmental policies, see Robert N. Stavins, *Market-Based Environmental Policies*, in PUBLIC POLICIES FOR ENVIRONMENTAL PROTECTION (Paul R. Portney & Robert N. Stavins eds., 2d ed. 2000).

¹⁰⁸ DOWIE, *supra* note 23, at 108.

¹⁰⁹ SHAIKO, *supra* note 77, at 84.

¹¹⁰ DOWIE, *supra* note 23, at 109; SHABECOFF, *supra* note 86, at 258-59.

¹¹¹ DOWIE, *supra* note 23, at 27.

however, failed to generate much in the way of a policy agenda. Earth Day 1990 took on a decidedly commercial tone as corporations used the event to tout their environmental records and to promote environmentally friendly products.

At the same time that the major environmental groups in Washington, D.C., have grown more professional and more accepted within the political mainstream, the environmental movement has also been more fragmented than it was in the 1970s. According to political scientist Richard Andrews, American environmental policy today is lacking a "coherent vision of the common environmental good that is sufficiently compelling to generate sustained public support for government action to achieve it."¹¹² The pragmatism underlying the environmental mainstream has contributed to a sense of alienation and division that has grown within some quarters of environmentalism. It has also permitted the message of environmentalism to be adopted (or some might say, co-opted) by corporate America. As a result, the vibrancy and unity that the environmental movement exhibited in 1970 has undoubtedly changed, if not diminished. It appears that the movement has settled into something of a steady state, leaving it doubtful that the movement can secure significant new advances in its goals. Yet owing to broad public support for environmental protection, the movement is still able to maintain the extensive set of laws that were established in earlier days.

III. STEADY-STATE ENVIRONMENTALISM?

The widespread acceptance of environmentalists' values by the public, and even apparently by the marketing departments of corporate America, signals how far environmentalism has penetrated American society. Despite its internal divisions, environmentalism is still one of the largest, and arguably the most influential, of all the social movements to arise in the last century.¹¹³ The public's acceptance of its values has made it much harder for the movement's opponents to effect a retreat from the nation's institutional commitments to the environment.¹¹⁴

The history of environmentalism suggests that law reform by itself is not adequate to sustain a social movement's goals over the long

¹¹² ANDREWS, *supra* note 9, at 370.

¹¹³ BRULLE, *supra* note 9, at 101, 114; Dunlap, *supra* note 47, at 103.

¹¹⁴ See Dunlap, *supra* note 47, at 99 (noting that widespread public support for environmentalism "is a major barrier for opponents of environmental protection").

term, especially in the face of resistance and counterattacks.¹¹⁵ Legal reform, if it is to have an enduring impact, needs to be accompanied by a genuine change in public values. Broad public support for the environment has helped to sustain the nation's basic institutional commitment to the environment as reflected in contemporary law. Public opinion, however, has not been so radically transformed as to propel the environmental agenda toward further social and legal transformation. Following the major transformations of the 1970s, environmentalism has settled into what appears to be a steady state that resists significant changes in the institutional status quo.

A. *Latent Environmentalism*

The environmental movement has been extraordinarily successful in transforming public opinion.¹¹⁶ As political scientist Walter Rosenbaum has written, the environmental movement "fashioned a broad public agreement on the need for governmental restoration and protection of environmental quality that has become part of the American public policy consensus."¹¹⁷ A substantial portion of the American public identifies with the environmental movement. In 1980, sixty-two percent of the public surveyed in a national poll were sympathetic to the environmental movement or active within it, while only four percent said they were unsympathetic.¹¹⁸ In 1992, a national poll found that eighty-one percent of respondents viewed themselves as sympathetic to the movement or active within it, with only two percent claiming to be unsympathetic.¹¹⁹ In 2001, even in the face of concerns about an economic slowdown, sixty-eight percent of Americans still claimed to be sympathetic to the environmental movement or active

¹¹⁵ There is a well-accepted maxim among social scientists that laws as enacted on the books do not necessarily equate with the law as it is put into action. For a discussion of the failure of laws to be implemented as intended, see MARVER H. BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* (1955); and JEFFREY L. PRESSMAN & AARON WILDAVSKY, *IMPLEMENTATION* (1973).

¹¹⁶ See Dunlap, *supra* note 47, at 98 (arguing that "the environmental movement's greatest success has been in converting a majority of Americans to its cause").

¹¹⁷ WALTER A. ROSENBAUM, *ENVIRONMENTAL POLITICS AND POLICY* 11 (4th ed. 1998); see also GRAHAM, *supra* note 7, at 57 (noting that "the American people have adopted the broad values of environmental protection, and that those values have been assimilated into the political system"); Dunlap, *supra* note 47, at 105-06 (observing that "very few policy issues achieve a level of consensus equal to that of current support for environmental protection").

¹¹⁸ MICHAEL E. KRAFT, *ENVIRONMENTAL POLICY AND POLITICS* 77 (1996).

¹¹⁹ Dunlap, *supra* note 47, at 99.

within it, while only five percent reported that they were unsympathetic.¹²⁰ According to a 1991 poll, as many as nine out of ten Americans are willing to identify themselves, at least weakly, as environmentalists.¹²¹

Yet even though large majorities of Americans support the values of environmentalism, and very few report being actively opposed to the movement, public support for the environment has not always been constant nor even necessarily deep. In the early 1970s, economist Anthony Downs suggested that the then-blossoming public interest in the environment would eventually wane, if not disappear altogether.¹²² Downs argued that public interest in social problems such as the environment typically proceeds through distinct stages, from a "pre-problem" stage, to a stage of public alarm, to a "post-problem" stage in which the problem fades from public attention altogether, even though the underlying social conditions that gave rise to alarm might still exist.¹²³ Public opinion about the environment has not turned out to be the fad that Downs's model seemed to suggest, for the issue has yet to reach the post-problem stage. Public attention and concern for the environment have exhibited "impressive staying power" especially in the face of periodic economic downturns over the past thirty years.¹²⁴

The environment has not, however, always been at the forefront of the public's agenda.¹²⁵ As Rosenbaum writes, "environmental issues seldom arouse intense or sustained concern for most Americans. . . . Sudden surges of public interest or apprehension about the environment do predictably rise in the aftermath of widely publicized environmental disasters or emergencies, but public concern is usually

¹²⁰ Riley E. Dunlap & Lydia Saad, *Only One in Four Americans Are Anxious About the Environment*, GALLUP NEWS SERVICE, Apr. 16, 2001, at <http://www.gallup.com/poll/releases/pr010416.asp>.

¹²¹ Dunlap, *supra* note 47, at 99; see also KRAFT, *supra* note 118, at 77 (citing a similar 1991 survey in which eight out of ten Americans identified themselves as environmentalists).

¹²² See Anthony Downs, *Up and Down with Ecology: The "Issue-Attention Cycle"*, 28 PUB. INT. 38, 38 (1972) ("American public attention rarely remains sharply focused upon any one domestic issue for very long.").

¹²³ *Id.* at 39-41.

¹²⁴ Dunlap, *supra* note 47, at 87.

¹²⁵ The environment, like other public issues, tends to follow a pattern of punctuated equilibrium on the political agenda, with periodic spikes of public interest followed by periods of relative inattention. See BAUMGARTNER & JONES, *supra* note 79, at 236 ("Punctuated equilibrium, rather than stability and immobilism, characterizes the American political system.").

evanescent unless the issue is repeatedly dramatized and personalized."¹²⁶ According to recent public opinion polls, the environment ranks well below other public issues, such as crime, education, and health care.¹²⁷ While consistently strong, support for the environment expressed in public opinion polls has varied over time, with other issues frequently taking precedence.

More significantly, public support for environmentalism tends to be latent. In the absence of crises, environmentalism does not motivate the political behavior of any large segment of the public. For example, environmental issues typically do not explain how most Americans vote.¹²⁸ Admittedly, no successful candidate for the American presidency can openly declare opposition to environmental protection.¹²⁹ Except perhaps in the very closest of elections, however, single-issue environmentalist voting fails to make a significant impact on electoral politics.¹³⁰ Furthermore, outside of electoral politics, Americans' broad acceptance of environmental values does not translate into strong support for government policies to change citizens' behavior, particularly when it comes to energy consumption and driving

¹²⁶ ROSENBAUM, *supra* note 117, at 44.

¹²⁷ See Dunlap & Saad, *supra* note 120 (noting that "[t]he environment ranks 16th on Americans' list of most important problems facing the country today").

¹²⁸ The environment typically ranks low on the list of issues that emerge in exit polls. See, e.g., Dunlap, *supra* note 47, at 107 ("[A] nationwide exit poll of over fifteen thousand voters found environment ranking last among a list of nine issues mentioned by voters as having affected their decision."). As Philip Shabecoff has written, "[t]he environment is something almost everybody talks about and almost nobody does anything about in the voting booth." PHILIP SHABECOFF, *EARTH RISING: AMERICAN ENVIRONMENTALISM IN THE 21ST CENTURY* 126 (2000). This is not to say that voters do not care about the environment, but rather that the environment is but one of many concerns of voters and seldom the dominant one when it comes to choosing national leaders.

¹²⁹ Dunlap, *supra* note 47, at 107 (noting that "very few candidates wish to be identified as 'antienvironmental'").

¹³⁰ See KRAFT, *supra* note 118, at 78 ("[E]nvironmental issues only rarely have been a decisive factor in election campaigns."); SHABECOFF, *supra* note 128, at 113 ("The environmental movement historically has been a minor, rather ineffectual player in the electoral process."); SHAIKO, *supra* note 77, at 38 ("In the electoral context, environmental concerns rarely mobilize significant numbers of voters."). Admittedly, in a close election such as the 2000 presidential race even a small number of votes of any particular kind can make a difference. In that race, the presence of a Green Party candidate, Ralph Nader, did make a difference given the closeness of the outcome in Florida. Nader's candidacy, however, was not necessarily an unequivocal proxy for environmentalism. He ran on a platform that was broader than environmentalism and, significantly, mainstream environmental organizations endorsed Gore in the campaign, not Nader.

habits.¹³¹

Although latent, public support for environmentalism has undeniably become embedded in American politics. The latency of this support means, however, that public concern for the environment affects the political process mainly when the public is activated by an environmental crisis or when the public believes that existing institutions designed to protect the environment are under threat. Rather than propelling the movement forward, public opinion remains a potential resource for environmentalists and an obstacle for those who would seek to change existing environmental laws.¹³²

B. *Change in Social Movements*

All social movements face challenges in sustaining themselves and advancing their goals over time. Social movements often fail to capture much of the public's attention in the first place. But even among those that do capture the public's attention, the public cannot be mobilized for a long time around any particular social cause.¹³³ Even the most successful social movements and their organizations tend to lose momentum over time.¹³⁴ The very institutionalization of a successful

¹³¹ See, e.g., GRAHAM, *supra* note 7, at 61 (noting that "[p]ublic reaction against measures such as restrictions on downtown access and parking that were part of federally mandated transportation control plans led Congress and the EPA to give up on such plans"). Public support for the environment has not kept Americans from buying SUVs and other vehicles which demand relatively high levels of fuel consumption, nor has it yet led to a significant market for renewable fuels or electric cars. Around eighty percent of Americans do report having engaged in voluntary recycling of some kind, although action of this kind does not necessarily require any great sacrifice. Dunlap, *supra* note 47, at 100-02.

¹³² Moreover, environmental organizations and activists serve as a resource for the Democratic party. Although the environment may not singularly motivate many voters, it does motivate a significant portion of the party activists and workers. I thank Richard Andrews for this observation.

¹³³ See BAUMGARTNER & JONES, *supra* note 79, at 250 (observing that "[m]ass mobilization, like attention, cannot be maintained forever"); RICHARD M. VALELLY, *RADICALISM IN THE STATES: THE MINNESOTA FARMER-LABOR PARTY AND THE AMERICAN POLITICAL ECONOMY* 16 (1989) (noting that "purposive, spontaneous collective action by ordinary people is exceptional" and when it does happen, "it is rarely sustained").

¹³⁴ John D. McCarthy & Mayer N. Zald, *The Trend of Social Movements in America: Professionalization and Resource Mobilization*, in *SOCIAL MOVEMENTS IN AN ORGANIZATIONAL SOCIETY* 337, 369 (Mayer N. Zald & John D. McCarthy eds., 1987) (discussing how successful movements can lose their mass support); Mayer N. Zald & Roberta Ash, *Social Movement Organizations: Growth, Decay and Change*, 44 *SOC. FORCES* 327, 340 (1966) (noting that although "there is often an association between growing institutionalization and bureaucratization and conservatism," this does not necessarily have to occur).

social movement, such as environmentalism, can constrain the movement for several reasons.

First, once institutionalized, social movements need to maintain their gains and this tends to siphon off the time and resources of movement organizations and activists. It is time consuming to work within and maintain an existing institutional structure. The time spent on maintaining the status quo is time that cannot be spent on addressing new problems. Activists can come to emphasize the preservation and maintenance of past accomplishments, rather than the promotion of a still more progressive agenda.

The Clean Air Act provides an example of the burdens of institutional maintenance confronted by the environmental movement. The Act was adopted in 1970 and amended again in 1977, but it took about a dozen years before Congress reauthorized the legislation again in 1990. National environmental groups devoted substantial resources to this decade-long battle. Moreover, administrative change under the Act has not necessarily been any less involved. The EPA revised the national ambient air quality standards for ozone in 1979 and for particulates in 1987. The Act requires the agency to consider revising the standards every five years, but only after the American Lung Association filed suit to compel the EPA to revisit the standards did the agency finally revise them in 1997. The standards were then challenged in the D.C. Court of Appeals, which struck down the standards on constitutional grounds.¹³⁵ In 2001, the Supreme Court reversed, affirming the constitutionality of the standards but allowing the litigants to go back to the D.C. Circuit for additional review on other grounds.¹³⁶ Assuming the new standards eventually survive judicial scrutiny, more than a decade will have passed before environmentalists see the nation's air quality standards updated. From the standpoint of the environmental movement, the resources devoted to revising the ozone and particulate standards may well be justified; nevertheless, this example illustrates the investments that successful social movements must sometimes make to maintain the institutions they helped create.

Second, successful social movements can be co-opted by their own success. Once institutions are created to address a social problem, it can become harder to mobilize the public.¹³⁷ The existence of an ex-

¹³⁵ *Am. Trucking Ass'ns v. EPA*, 175 F.3d 1027, 1034 (D.C. Cir. 1999).

¹³⁶ *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 121 S. Ct. 903, 912-14 (2001).

¹³⁷ See, e.g., VALELLY, *supra* note 133, at 139-73 (detailing the decline of the farm labor movement in the states following the establishment of federal institutions during

tensive array of environmental laws and governmental institutions that deal with environmental issues makes less likely the kinds of environmental crises needed to activate public outrage. This is not to suggest that significant environmental concerns do not remain, but rather that many of the environmental problems that are most visible to the public—such as oil spills, bulging soot, or rivers caught on fire—have largely been addressed by existing laws and institutions. Even when a crisis does occur, the fact that government institutions exist to respond to it tends to reassure the public and allay its concerns.¹³⁸ As a result, the very success of the environmental movement in creating laws and institutions tends to constrain its ability to generate public support for significant new laws.

Finally, social movements can confront countermovements that sometimes reverse their accomplishments. The environmental movement has hardly been immune to counter-efforts. As Richard Andrews writes, environmental concerns are “constantly at risk of counterattack by self-interested constituencies painting them as matters of mere amenities and individual taste.”¹³⁹ The environmental movement has experienced resistance from smaller but vocal “wise use” and “sagebrush rebellion” movements, principally in Western states, along with the resistance from the Reagan administration in the 1980s and Republican members of Congress in the 1990s. What has been remarkable is that the environmental movement, unlike other social movements, has not only prevailed in these times of counterattack, but has each time come back apparently strengthened by the encounter.

C. *Sustaining Law Reform*

Even in the face of adversity, division, and the normal process of decay, the environmental movement has maintained a profound presence in American public life. The movement has achieved its suc-

the New Deal).

¹³⁸ Riley Dunlap makes a similar observation:

[A] movement's success in stimulating governmental action to solve a problem leads the public to believe that the problem is “being taken care of” and there's no longer any reason to worry about it. In other words, once the government assumes responsibility for a problem, the general citizenry . . . is likely to feel less personal concern for the problem. Ironically, then, the very success of a movement in getting policymakers to address its grievances . . . may tend to undercut its support among the public.

Dunlap, *supra* note 47, at 66.

¹³⁹ ANDREWS, *supra* note 9, at 134-35.

cesses due to the broad transformation in both institutions and social values that it helped engender. The quasi-constitutional transformation of American law in the 1970s, along with the growth of national environmental organizations, has secured a place for environmental values in economic and governmental decision making, even during times when the environment has not been high on the public's agenda. As political scientists Frank Baumgartner and Bryan Jones have argued in their study of agenda setting, institutions create legacies for even short-lived bursts of public mobilization: "Institutions, especially government bureaucracies, do not simply 'fade away' like public interest or media attention."¹⁴⁰ Law, after all, is a means of entrenching particular values, giving them at least a presumptive priority in subsequent decision making.¹⁴¹

But law is also not fully autonomous from society.¹⁴² As we have seen, the creation of the U.S. system of environmental law came about in the 1970s as a response to a major political mobilization and a burst of public concern. Just as environmental law came into existence due to politics, so too can it be changed due to politics. Since the creation of the broad sweep of environmental statutes in the 1970s, these laws have been applied in a politically charged environment.¹⁴³ At key points during the past several decades, counter-efforts sought to mark a retreat from the environmentalists' agenda. In each major instance, the environmental movement was able to prevail because it could draw upon broad public support and successfully portray its opponents as threatening to undermine core environmental values. Had it not been for the public's deep, albeit latent, acceptance of environmentalism, the victories won by the law reformers of the 1970s could

¹⁴⁰ BAUMGARTNER & JONES, *supra* note 79, at 87.

¹⁴¹ See FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 52, 173-74, 229-33 (1991) (analyzing law as a form of rule-based decision making that entrenches generalizations and presumptively constrains decision makers).

¹⁴² See RICHARD LEMPert & JOSEPH SANDERS, *AN INVITATION TO LAW AND SOCIAL SCIENCE* 427 (1986) (suggesting that law is only partially autonomous because "the application [of the laws] is constantly penetrated by extralegal social, political, and ethical interests").

¹⁴³ Legislative politics has also become more polarized in recent decades. David C. King, *The Polarization of American Parties and Mistrust of Government*, in *WHY PEOPLE DON'T TRUST GOVERNMENT* 155, 156 (Joseph S. Nye, Jr. et al. eds., 1997). While the environment had once been a bipartisan issue, it has become more partisan over the years. See, e.g., William D. Ruckelshaus, *Stopping the Pendulum*, *ENVTL. F.*, Nov./Dec. 1995, at 25 (describing environmental policymaking and implementation as a "smoky battlefield").

very well have been reversed or left to atrophy by the countermovements of the 1980s and 1990s.

Social movements need law reform to help achieve their goals of social change, but law reform itself needs a supportive social and political climate if it is to maintain its viability and effectiveness over time. The environmental movement has succeeded in providing this supportive climate.¹⁴⁴ Just as the legal system helps sustain environmentalism during periods of public inattention, the system of environmental law is itself sustained by a broad social consensus in favor of environmental protection and by a latent environmentalism that stands ready to be activated by environmental groups.¹⁴⁵

Law reform is not simply a tool for changing society; rather, law reform is itself affected by society and its nonlegal norms and values. To be successful, social movement reformers need not only seek changes in the law but changes in public values too. In the absence of direct changes to society's values, law reform efforts could prove at worst vacuous or at best vulnerable to counterattack or atrophy over time. The history of the U.S. environmental movement teaches that the leadership of governmental institutions can retreat from earlier commitments made to the values of a social movement. For a social movement to resist such a retreat, it is essential to draw upon a solid base of public support.

CONCLUSION

During the past half-century, the environmental movement has transformed itself from a relatively small group of organizations and activists into an institutionalized and embedded force within American society. We have reached a point in time where many Americans,

¹⁴⁴ As sociologist Riley Dunlap has written, the environmental movement has achieved great success in getting the American public on its side:

The environmental movement has been enormously successful in gaining the approval and participation of the American public, probably more so than any other contemporary social movement. . . . Such results provide a vital degree of legitimacy to environmentalists' claims of working on behalf of the society at large, while at the same time making it difficult for those who oppose them to make similar claims.

Dunlap, *supra* note 47, at 103.

¹⁴⁵ See GRAHAM, *supra* note 7, at 50 ("Environmental protection has become part of the fabric of American society, its premises supported by Democrats and Republicans alike."); KRAFT, *supra* note 118, at 74 (describing the environment as a "core part of mainstream American values" and "as close to a consensual issue as one usually finds in U.S. politics").

even if they do not strongly identify themselves as environmentalists, nevertheless accept the values of environmentalism. In the early 1970s, the environmental movement made exceptional use of grass-roots strategies culminating with Earth Day, which prompted passage of a wide range of federal environmental legislation and the establishment of a nationally coordinated environmental strategy through the U.S. Environmental Protection Agency. The early years of the movement called attention to highly visible and salient environmental threats, such as rivers on fire, long lines at gas stations, and billowing plumes of soot from factories. Responding to crises and protests, legislators in the 1970s created the framework of laws for environmental protection that remains to this day.

The enactment of a series of major environmental laws signaled the institutionalization of the environmental movement and resulted in notable improvements in some environmental conditions. Politically, environmental groups have since deepened their commitment to insider political strategies, engaging in the same kinds of lobbying, campaign financing, and litigation that industry groups have traditionally used. Over the years, however, elected officials have periodically railed against the burdens associated with environmental regulation and have sought to undercut the legal protections secured by the environmental movement. Despite repeated efforts to restrain environmental regulation and despite the fact that environmental groups are outnumbered by business lobby groups, the movement has succeeded in protecting the regulatory structure established in the 1970s. It has maintained, and even expanded, the scope of federal environmental regulation in no small measure because its values have become broadly embedded in the general public. Public support for environmental protection has remained high. Even in times of general distrust of government, the public has supported the federal government's role in environmental policy. The institutionalization of environmentalism in law has been backed up by the entrenchment of environmental values throughout society.

The history of the environmental movement in the United States has been characterized by a reciprocal interaction among law, society, and movement strategies. Social movements' law reform efforts aim to affect society and bring about improvements in social conditions, but these efforts are themselves affected by society and, if they are to last, need to be sustained by public support. Even when movements are successful in establishing new laws designed to effect social change, those laws need to be implemented over time in order to se-

cure meaningful social change. With the passage of time, the salience of social movement campaigns normally tends to dissipate and resistance to regulatory regimes, statutes, or court decisions can arise. Over the past three decades, the United States has experienced at least two major moments of resistance to environmental law, but each time these countermovement efforts were resisted through the activation of a latent, but persistent, environmentalism in the public at large. The combination of the diffusion of the environmental movement's values across society and the institutionalization of environmental values in law, governmental agencies, and professional environmental organizations has sustained the environmental movement's accomplishments over time. If the environmental movement is properly viewed as one of the most successful social movements of the twentieth century, it is because environmental law and society have acted to reinforce one another.

This widespread legal and social institutionalization of the environmental movement has not, however, unequivocally promoted all its aims. Environmental law has succeeded in addressing the most visible environmental problems and, in so doing may have, ironically, contributed to a degree of complacency on the part of the public when it comes to less tangible, but potentially no less serious, environmental problems. Even though activated public opinion has helped prevent a large-scale retreat from existing environmental controls, prevailing public sentiment appears to be insufficient to support a major expansion of environmental regulation. Any significant, new, and perhaps much more costly advances in environmental law will still probably require salient focal points and crises to prompt legislative action.